STATE OF ALASKA

IBLA 83-973 Decided March 22, 1984

Appeal from decision of the Alaska State Office, Bureau of Land Management, reserving certain easements across Native-selected lands under authority of section 17(b) of the Alaska Native Claims Settlement Act.

Set aside and remanded.

1. Alaska Native Claims Settlement Act: Easements: Generally

   Sec. 17(b)(3) of ANCSA directs the Secretary of the Interior, after consultation, to reserve such public easements as he determines are necessary. In making easement reservations, the Secretary must adhere to the specific selection criteria set forth in sec. 17(b)(1) of ANCSA.

2. Alaska Native Claims Settlement Act: Easements: Review
   When a party appeals a BLM easement determination made pursuant to ANCSA, the burden of proof is upon the party challenging the determination to show that the decision is erroneous. A decision to reserve an easement will ordinarily be affirmed where it is supported by a rational basis. However, when the written assessment required by 43 CFR 2650.4-7 and the record do not provide a sufficient factual basis for the Board to determine the reasonableness of the BLM decision or the merits of the appellant's arguments, the decision will be set aside and the case remanded to BLM for compilation of a more complete record and a reevaluation of its easement decision.

APPEARANCES: M. Francis Neville, Esq., Anchorage, Alaska, for appellants, F. Christopher Bockmon, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management, James Q. Mery, Esq., Fairbanks, Alaska, for Doyon, Limited.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The State of Alaska has appealed the portion of the July 20, 1983, decision of the Alaska State Office, Bureau of Land Management (BLM), approving

certain lands for conveyance for Doyon, Limited (Doyon), which reserves certain easements. The BLM easement determination was made pursuant to section 17(b) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1616(b) (1976), and the enabling regulations at 43 CFR 2650.4-7.

The BLM decision provided for the conveyance of lands in T. 3 N., R. 17 W., Fairbanks meridian. The record reflects that there are three routes of travel which cross this township and provide access from the town of Tofty to the publicly owned lands west of the Doyon selection: (1) Easement EIN 8a L west begins at trail easement EIN 8b L in sec. 13, T. 3 N., R. 17 W., Fairbanks meridian, and extends northwesterly through T. 3 N., R. 17 W. to public lands; (2) Easement EIN 8b L which extends from Tofty in sec. 18, T 3 N., R. 16 W., Fairbanks meridian, westerly through T. 3 N., R. 17 W. to public lands; and (3) Easement EIN 11 C 3 which begins at trail easement EIN 8b L in sec. 23, T. 3 N., R. 17 W., Fairbanks meridian and extends southerly to easement EIN 4 b, and continues westerly to public lands. BLM initially proposed that all three routes be reserved as public easements under section 17(b) of ANCSA, and the Federal-State Land Use Planning Commission, authorized by section 17(a) of ANCSA, agreed. Later in the conveyance process BLM determined that only two routes, EIN 8a L and EIN 11 C 3, should be reserved. Appellant is appealing that part of the BLM decision which reserved EIN 8a L and EIN 11 C 3 1/ and did not reserve EIN 8b L.

Appellant contends that BLM erred by failing to reserve EIN 8b L -- that it should have been reserved instead of or in addition to EIN 11 C 3. Further, appellant contends that EIN 8a L and EIN 8b L should have been reserved as 60-foot road easements thus permitting the use of two-wheel drive automobiles and trucks, or as nonstandard 50-foot trail easements allowing use by two-wheel drive vehicles.

The Alaska Regional Solicitor's Office contends that easement EIN 8b L is duplicative of EIN 11 C 3 in that they would serve the same public lands and allow the same uses. The Regional Solicitor's Office also contends that there is no evidence of two-wheel-drive vehicle use on these easements to justify changing the BLM decision.

[1] Section 17(b)(3) of ANCSA directs the Secretary of the Interior, after consultation, to "reserve such public easements as he determines are necessary." In Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977), it was held that in making easement reservations, the Secretary must adhere to the specific selection criteria set forth in section 17(b)(1) of the Act. Section 17(b)(1) states:

> The Planning Commission [Joint Federal-State Land Use Planning Commission for Alaska established under section 17(a) of the Act] shall identify public easements across lands selected by Village Corporations and the Regional Corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee international treaty obligations, a full right

1/ That portion of trail EIN 8b L from public lands in sec. 18, T. 3 N., R. 16 W., Fairbanks meridian to trail EIN 11 C 3, L was incorporated as a part of trail EIN 11 C 3, L.

> of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important.

Subsequent to the decision in Alaska Public Easement Defense Fund the Department published substantive regulations governing easement reservations to conform to the court's analysis of ANCSA's statutory requirements. See 43 FR 55326 (Nov. 27, 1978), codified at 43 CFR 2650.4-7. The regulatory requirements in the foregoing section pertinent to this appeal are the following:

> § 2650.4-7 Public easements.
>
> (a) General requirements. (1) Only public easements which are reasonably necessary to guarantee access to publicly owned lands * * * shall be reserved.
>
> (2) In identifying appropriate public easements assessment shall be made in writing of the use and purpose to be accommodated.
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> * * * * * * *
>
> (b) * * * If public easements are to be reserved, they shall: * * *
> (ii) Within the standard of reasonable necessity, be limited in number and not duplicative of one another (non-duplicative does not preclude separate easements for winter and summer trails, if otherwise justified).

[2] The burden of proof upon a party challenging a BLM easement determination made pursuant to ANCSA is to show that the determination is erroneous. United States Fish & Wildlife Service, 72 IBLA 218 (1983). Here, appellant asserts that if BLM had written an adequate assessment it would have indicated that EIN 8b L is used and is suitable for uses and purposes which cannot be accommodated by EIN 11 C 3 and, therefore, that EIN 8b L is not duplicative of EIN 11 C 3. In support of its conclusion, appellant states:

> EIN 8b is a winter road for transporting significant quantities of fuel and supplies to commercial mining operations on the publicly owned lands west of the Doyon selection. A snow and ice road is constructed in the winter to allow heavy loads to be transported by trucks and trailers.
>
> EIN 11 is a snow-machine trail which cannot accommodate the traffic by larger vehicles hauling heavy loads. EIN 11 cannot be used to adequately supply the large scale mining operations in the area because of the excessive grades and severe glaciation along that route. Athough [sic] EIN 11 is a useful trail for snow-machines and some all-terrain vehicles, it cannot be used by the pick-up trucks, fuel tanker trucks and other vehicles used on EIN 8b. In short, EIN 8b can accommodate the uses of EIN 11, but the reverse is impossible.

Statement of Reasons at 3.

The Regional Solicitor contends, however, that BLM has a rational basis for its decision which is supported by BLM's written assessment. The Solicitor asserts that EIN 8b L and EIN 11 C 3 would serve the same lands and allow the same uses, including "small and large all-terrain vehicles, track vehicles, and four-wheel drive vehicles" which would "adequately serve the miners to the west of the selection area" (Answer of BLM at 2). The Solicitor believes that these assertions support the BLM conclusion that the two easements are duplicative.

While a decision to reserve an easement will ordinarily be affirmed where it is supported by a rational basis, this Board reviews de novo all such actions. See United States Fish & Wildlife Service, supra, overruling Northway Natives, Inc., 69 IBLA 219 (1982), to the extent that it declared that the Board must affirm and cannot nullify an easement decision supported by a rational basis.

United States Fish & Wildlife Service, supra at page 222, quotes with approval the declaration in Northway, supra at page 230, that:

> In the exercise of his [the Secretary's] authority he must be reasonable and not capricious in his determination of what easements are necessary or not necessary. A determination that an easement is necessary or not necessary should be recorded and accompanied by a written record in support thereof in case the determination is challenged. (Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Camp v. Pitts, 411 U.S. 138 (1973) [)].

Our review of the written assessment' by BLM reveals a discussion of the use and purpose of the various easements so general that it does not provide information specific enough to enable us to determine whether BLM's decision is reasonable. Further, there is no adequate documentation before this Board regarding BLM's decision from which we can ascertain whether its decision to select EIN 11 C 3 and reject EIN 8b L was reasonable. The record provides no data that reveals why BLM selected EIN 11 C 3 rather than EIN 8b L. The one map provided is inadequate to make comparisons meaningful. The record reveals that the appellant and numerous miners consistently urged EIN 8b L as a high priority access route because of the winter access it provides for supplies and fuels. The record verifies that a snow and ice road bridging streams is constructed in the winter on EIN 8b L. See Memos to the Files from Realty Specialist dated January 13, 1983, and December 7, 1982. Letters of record from interested miners reveal their use of large trucks and trailers and pick-up trucks on EIN 8b L. We are unable to ascertain what consideration, if any, was afforded steep grades or glaciation in selecting an easement route. The written comments on each easement are conclusory and general. We are, therefore, unable to determine the reasonableness of the BLM decision or the merits of appellant's arguments on the present record. There is insufficient elaboration of the factual data that is presented.

Therefore, we remand this case to BLM for compilation of a more complete record and a reevaluation of its easement selections. In determining its selection, BLM should consider the arguments presented by appellant in

this appeal. If BLM decides that EIN 11 C 3 and EIN 8b L are duplicative and determines again that EIN 11 C 3 should be reserved and EIN 8b L should be rejected, BLM shall set forth the reasons for doing so sufficiently for the Board to properly consider the issues in event of an appeal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for action consistent with this decision.

Edward W. Stuebing
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

R. W. Mullen
Administrative Judge